129035

STATE OF MICHIGAN

IN THE SUPREME COURT

PEOPLE OF THE STATE OF MICHIGAN,

Plaintiff-Appellee,

-vs-

CHARLES WAYNE FRANCISCO,

Defendant-Appellant.
_____/

Supreme Court No. 129035

Court of Appeals No. 252188

Circuit Court No. 03-189882-FH

OAKLAND COUNTY PROSECUTOR
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DEFENDANT-APPELLANT'S SUPPLEMENTAL BRIEF
IN SUPPORT OF APPLICATION FOR LEAVE TO APPEAL

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STATEMENT OF QUESTIONS PRESENTED

I. **DOES THE FIRST INSTRUCTION FOR OV 13 ALLOW FOR THAT VARIABLE TO BE SCORED BASED ON FELONIES COMMITTED IN A FIVE-YEAR PERIOD THAT DOES NOT INCLUDE THE DATE OF THE SENTENCING OFFENSE? IS RESENTENCING REQUIRED UNDER THE CIRCUMSTANCES OF THIS CASE?**

Court of Appeals answered, "Yes," to the first part and did not reach the second part.

Defendant-Appellant answers, "No," to the first part and "Yes" to the second part.

STATEMENT OF MATERIAL PROCEEDINGS AND FACTS

Defendant-Appellant Charles Wayne Francisco was convicted by a jury, as charged, of one count of first-degree home invasion, MCL 750.110a(2), in the Oakland County Circuit Court, before the Honorable Rudy J. Nichols.[1] (T 9/23/03, p 6). At sentencing, Defense Counsel objected to the scoring of Offense Variables 9 and 13. (S 3-7). In regard to Offense Variable 13 ("OV 13"), Defense Counsel argued that it could not be scored because the felonies upon which the scoring was based, Mr. Francisco's manslaughter convictions from 1986, were not within 5 years of the sentencing offense as required in the instructions. (S 4-5). The Prosecutor argued that the scoring was proper pursuant to the Court of Appeals' decision in People v McDaniel.[2] (S 6-7). The Court ruled that OV 13 was properly scored pursuant to McDaniel. (S 8).

The Court's rulings on OVs 9 and 13 left Mr. Fransisco's sentencing guidelines range at 87 months to 217 months. (See Sentencing Information Report *attached as Appendix* A). The Court sentenced Mr. Francisco to 8 ½ years (102 months) to 40 years imprisonment, as a habitual offender – 3rd offense,[3] with credit for time served. (S 7; see Judgment of Sentence *attached as Appendix B*).

Mr. Francisco appealed by right to the Court of Appeals and, among other claims, challenged the scoring of OV 13. The Court of Appeals affirmed the scoring of OV 13 based on its existing case law, finding that "simple application" of McDaniel did not allow for any other legal outcome. People v Francisco, unpublished opinion per curiam of the Court of Appeals, decided May 26, 2003 (Docket No. 252188), p 5. (See Opinion *attached as Appendix C.*)

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[1] Defendant was also convicted of larceny from a building, MCL 750.360. (T 9/23/03, p 7). On the Prosecutor's motion, that conviction was rescinded. (T 9/23/03, p 11-12; see Judgment of Sentence *attached as Appendix B*).

[2] People v McDaniel, 256 Mich App 165, 662 NW2d 101 (2003).

[3] MCL 769.11

Mr. Francisco sought leave to appeal his conviction and sentence in this Honorable Court. This Court ordered the appointment of appellate counsel and directed the filing of supplemental briefs addressing: 1) whether McDaniel "was correct in deciding that OV 13 may be scored based on three or more felonies committed in any five-year period even if that period does not include the date of the sentencing offense, and 2) assuming that OV 13 should not have been scored, is defendant automatically entitled to resentencing because of the scoring error, or is resentencing unnecessary because the minimum sentence imposed was 'within the appropriate guidelines sentence range' within the meaning of MCL 769.34(10)."[4] (See Order *attached as Appendix D.*)

[4] The McDaniel case was appealed to this Court. This Court initially held it in abeyance pending its decision in People v Kimble, 470 Mich 305, 684 NW 2d 669 (2004). See People v McDaniel, 668 NW2d 909 (2003). Then this Court ordered oral argument, People v McDaniel, 471 Mich 934, 690 NW2d 97 (2004), and finally dismissed the application per stipulation of the parties, People v McDaniel, 692 NW2d 387 (2005).

ARGUMENTS

I. THE FIRST INSTRUCTION FOR OV 13 DOES NOT ALLOW FOR THAT VARIABLE TO BE SCORED BASED ON FELONIES COMMITTED IN A FIVE-YEAR PERIOD THAT DOES NOT INCLUDE THE DATE OF THE SENTENCING OFFENSE. RESENTENCING IS REQUIRED UNDER THE CIRCUMSTANCES OF THIS CASE.

Issue Preservation

As detailed above in the Statement of Facts, Defense Counsel objected on this ground to the scoring of OV 13 at sentencing and the Circuit Court ruled that under People v McDaniel, 256 Mich App 165, 662 NW2d 101 (2003) the scoring was correct. (S 3-8). The issue is preserved for appellate review. MCL 769.34(10); MCR 6.429(C).

Standard of Review

The proper interpretation and application of the statutory sentencing guidelines are legal questions that this Court reviews de novo. People v Houston, 473 Mich 399, 403, 702 NW2d 530 (2005); People v Morson, 471 Mich 248, 255, 685 NW2d 203 (2004).

Discussion

Mr. Francisco was improperly assessed 25 points for OV 13 on the basis of his 1987 convictions for 3 counts of involuntary manslaughter having an offense date of July 26, 1986.[5] (S 4-8; see SIR attached as Appendix A; Presentence Report, "Criminal Justice", "Adult History", p 3). The sentencing offense occurred in 2003. The statutory instructions for OV 13

[5] A copy of the Presentence Report was previously filed in the Court of Appeals. The Presentence Report indicates Mr. Francisco had 1 other prior felony conviction, i.e. a 1988 conviction for attempted felonious assault having an offense date of August 17, 1987. Both manslaughter and attempted felonious assault are within the Crimes Against a Person category under the statutory sentencing guidelines. See MCL 777.16p; MCL 777.16d. The instant conviction, home invasion, is also within the Crimes Against a Person category. See MCL 777.16f.

do not allow for that variable to be scored based on felonies committed in a five-year period that does not include the date of the sentencing offense.

Correction of the error results in a lower guidelines range. Mr. Francisco's sentence is grounded in a mistake of law, i.e., an improperly inflated guidelines range, and thus his sentence is invalid. He is entitled to resentencing where the sentencing court did not indicate that a lower range would have had no effect on the sentence it imposed.

The issue presented here requires this Court to construe MCL 777.43 and MCL 769.34(10). The primary goal of statutory construction is to ascertain and give effect to the intent of the Legislature. Houston, supra at 403; Morson, surpa at 255. The most relevant starting point for discerning legislative intent lies in the plain language of the governing statutes, i.e., the words of the statutes supply the most reliable source of the Legislature's intent. Houston, supra at 404; Shinholster v Annapolis Hospital, 471 Mich 540, 549, 685 NW2d 275 (2004). If the language used by the Legislature is clear and unambiguous, courts must enforce the statute as written and follow its plain meaning, free of any judicial gloss. Morson, supra at 255; Shinholster, supra at 549; Morales v Auto-Owners Insurance Co, 469 Mich 487, 490, 672 NW2d 849 (2003). Effect should be given to every phrase, clause, and word. Robertson v DaimlerChrysler, 465 Mich 732, 757, 641 NW2d 567 (2002); Jenkins v Great Lakes Steel Corp, 200 Mich App 202, 209, 503 NW2d 668 (1993). The statutory language must be read and understood in its grammatical context, unless it is clear that something different was intended. Sun Valley Foods Co v Ward, 460 Mich 230, 237, 596 NW2d 119 (1999).

A. MCDANIEL WAS WRONGLY DECIDED; OV 13 WAS IMPROPERLY SCORED.

The Court of Appeals' majority holding in McDaniel, supra, is contrary to the plain language of the OV 13 statute and violated the rules of statutory construction. As a result, OV 13 was improperly scored here.

MCL 777.43 provides, in pertinent part:

> (1) Offense variable 13 is continuing pattern of criminal behavior. Score offense variable 13 by determining which of the following apply and by assigning the number of points attributable to the one that has the highest number of points:
>
> * * *
>
> (b) The offense was part of a pattern of felonious criminal activity involving 3 or more crimes against a person.....25 points
>
> * * *
>
> (f) No pattern of felonious criminal activity existed.....0 points
>
> (2) All of the following apply to scoring offense variable 13:
>
> (a) **For determining the appropriate points under this variable, all crimes within a 5-year period, *including the sentencing offense*, shall be counted regardless of whether the offense resulted in a conviction.** [Emphasis added.]

In McDaniel, supra at 172-173, the majority held that "any" five year period would suffice and the period need not include the sentencing offense because "the phrase 'including the sentencing offense' modifies 'all crimes.'[6] In contrast, the dissenting judge explained "my reading of the statutory language clearly precludes consideration of a five-year period that does not include the sentencing offense."[7] Id. at 174.

The dissenting judge correctly reasoned that the Legislature intended that the sentencing offense must be included within any 5-year period referenced in scoring OV 13. By the statute's terms, the sentencing offense could be anywhere within the 5-year period used, i.e, at the beginning, the middle, the end, etc. But, any 5-year period used must contain the sentencing offense.

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[6] The majority held:

> The statute [MCL 777.43(2)(a)] clearly refers to "a five-year period." The use of the indefinite article "a" reflects that no particular period is referred to in the statute. Had the Legislature intended the meaning defendant assumes, the statute would refer to "the 5-year period immediately preceding the sentencing offense." Instead, the phrase "including the sentencing offense" modifies "all crimes." That is, the sentencing offense *may* be counted as one of the three crimes in *a* five-year period. That does not, however, preclude consideration of a five-year period that does not include the sentencing offense. [McDaniel, supra at 172-173 (Emphasis in original).]

[7] The dissent wrote:

> The majority agrees with the prosecutor's interpretation of the statute and asserts that "[t]he use of the indefinite article 'a' reflects that no particular period is referred to in the statute. I disagree. The language at issue states that "all crimes within a 5 year period, *including the sentencing offense*, shall be counted." MCL 777.43(2)(a) (emphasis added). Because the word "shall" is used, I find it impossible for any five-year period that does not include the sentencing offense to be considered. Contrary to the majority's interpretation of the statute, my reading of the statutory language clearly precludes consideration of a five-year period that does not include the sentencing offense. [McDaniel, supra at 173-174 (Emphasis in original).]

The McDaniel majority's interpretation is contrary to the well-established "last antecedent" rule of statutory interpretation. The legislature clearly modified or restricted the words "within a 5-year period" with the parenthetical phrase "including the sentencing offense." The last antecedent rule provides that a modifying or restrictive word or clause contained in a statute applies solely to the immediately preceding clause or last antecedent, unless something in the statute requires a different interpretation. Stanton v City of Battle Creek, 466 Mich 611, 616, 647 NW2d 508 (2002); Sun Valley Foods Co v Ward, supra at 237. Thus, the parenthetical clause "including the sentencing offense" applies to the words that immediately precede it, i.e., "within a 5-year period." It does not skip over the words immediately preceding it, have no relationship to them, and then go onward to modify or restrict only the words "all crimes" as the McDaniel majority held.

The McDaniel majority's mistake is illustrated by the application of the last antecedent rule performed by this Court in Stanton v City of Battle Creek, supra at 616:

> Section 1405, the motor vehicle exception, provides:
>
> > Governmental agencies shall be liable for bodily injury and property damage resulting from the negligent operation by any officer, agent, or employee of the governmental agency, of a motor vehicle of which the governmental agency is *owner*, **as defined in [the Motor Vehicle Code]**, as amended, being sections 257.1 to 257.923 of the Compiled Laws of 1948.
>
> The Court of Appeals erroneously assumed that the definitional phrase in § 1405 refers to the term 'motor vehicle.' Grammatically, the final clause of § 1405 sends the reader **to the Michigan Vehicle Code** only for the definition of '*owner.*'
> [Emphasis added.]

The phrase "including the sentencing offense" was meant to modify, and serve as a parenthetical of the phrase, "within a 5-year period." Nothing in the statute requires a different interpretation.

In fact, an examination of an earlier part of the statute supports this interpretation as well. MCL 777.43(1), provides, "Offense variable 13 is **continuing pattern** of criminal behavior. . . ." (Emphasis added.) If a 5-year period that did not include the sentencing offense could be used to score OV 13, then OV 13 would not represent a "continuing pattern" of criminal behavior. A "pattern" is a regular, mainly unvarying way of behavior; it is synonymous with model. See Webster's New World Dictionary of the American Language, Second College Edition (1986).[8] "Continuing" means "remaining in force or being carried on without letup", Wordnet (r), 1.7, to be "continuous," "constant," "needing no renewal," Merriam-Webster's On-line Dictionary, 10th Edition. While three or more offenses committed in 1986 and 1987 might form a "pattern,"[9] they themselves do not constitute a "continuing pattern" as of 2003. The sentencing offense committed in 2003 might be consistent with the "pattern" of those offenses committed in 1986 and 1987, but the 2003 sentencing offense would not be part of a "continuing" pattern, given the intervening passage of 15 years.

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[8] It is appropriate to consult a dictionary for determining the common, ordinary meaning of a word or phrase. Stanton v Battle Creek, supra at 617.

[9] The Presentence Report indicates Mr. Francisco had 4 prior felony convictions, i.e. 3 counts of involuntary manslaughter, with a single offense date in 1986, convicted in 1987, and a 1988 conviction for attempted felonious assault having an offense date in 1987.

Upon information and belief, the 3 involuntary manslaughter convictions arose from a single act, a car accident that resulted in the deaths of three individuals. It does not seem that the Legislature intended these three convictions resulting from a single act be counted as more than one offense for purposes of OV 13. See People v Stoudemire, 429 Mich 262, 414 NW2d 693 (1987)(the Legislature did not intend for multiple convictions arising from a single transaction that occurred at the same time and place to be counted as more than one offense for purposes of habitual offender sentencing enhancement). *How does a single grossly negligent act become a pattern in and of itself or count for more than one event towards a pattern?*

The McDaniel majority's interpretation really renders the parenthetical phrase "including the sentencing offense" surplusage or nugatory. "Courts must give effect to every word, phrase and clause in a statute and avoid an interpretation that would render any part of the statute surplusage or nugatory." State Farm Fire & Cas Co v Old Republic Ins Co, 466 Mich 142, 146, 644 NW2d 715 (2002); see also Robertson, supra at 757.

Further, any suggestion that the Legislature left sentencing judges *discretion* to score OV 13 based on a 5-year period that does not include the sentencing offense is incorrect. Again, MCL 777.43(2)(a) provides: "**For determining the appropriate points under this variable**, all crimes within a 5-year period, including the sentencing offense, **shall be counted** regardless of whether the offense resulted in a conviction." (Emphasis added.) The plain language of MCL 777.43(2)(a) does not give discretion for a determination of points under OV 13 of crimes within a 5-year period that does not include the sentencing offense. The language defining *the manner* in which the appropriate points are to be determined is *mandatory*.

There is no variable, either prior record or offense, within the statutory sentencing guidelines that gives sentencing judges the discretion to score points or not; scoring is based only upon whether the statutory prerequisites are met or not. Discretionary point assessment would be antithetical to the Legislature's stated intentions that these sentencing guidelines protect against unjustified disparate treatment in sentencing and ensure that like offenders who commit like offenses receive substantially similar sentences. See People v Babcock, 469 Mich 247, 267 n 21, 666 NW2d 231 (2003); 1994 PA 445 § 33(1)(e)(iv)(repealed March 7, 2002).

In the instant case, the Prosecutor may try to save the scoring of OV 13 by proposing that the sentence discharge dates of Mr. Francisco's prior offenses, April 5, 2002, be used rather than the offense commission dates, 1986 and 1987, to count the old offenses within a 5-year period that includes the sentencing offense. This too would violate the Legislature's intent.

In OV 13, by its plain language, the Legislature was concerned with the *commission of offenses* rather than with convictions or a continuing connection to the criminal justice system.[10] The instructions provide that "crimes" be counted, rather than convictions. MCL 777.43(1). In fact, the instructions provide that "crimes" be counted regardless of whether a conviction for that offense exists. MCL 777.43(2)(a). This offense variable seeks to measure "criminal behavior" and "criminal activity," not convictions. MCL 777.43. The discharge date from a conviction/sentence has no relevance to the activity that this variable seeks to measure. Serving a sentence is not in and of itself a crime. *Cf.* People v Kaczmarek, 464 Mich 478, 482-483, 628 NW2d 484 (2001) (violating probation is not a crime). Individuals held within our prisons, those serving probation sentences, and those out on parole, can and sometimes do commit the types of felonious crimes that OV 13 seeks to measure, i.e. crimes against a person or property, crimes related to membership in an organized crime group, and certain drug offenses.[11] MCL 777.43(1).

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[10] Convictions and a continuing connection to the criminal justice system are scored in the prior record variable. See PRVs 1 – 7 (MCL 777.51 – 777.57).

[11] *It is unclear on this record whether Mr. Francisco served the entire 15-year maximum in prison or was out on parole at times.* The Presentence Report indicates that he was paroled and returned to prison on more than one occasion and that he "was terminated from parole in April 2002." (Presentence Report, "Evaluation and Plan", p 1). However, at sentencing, Defense Counsel indicated that Mr. Francisco served the entire maximum sentence of 15 years in prison. (S 5).

The Legislature did not instruct that OV 13 be scored based on discharge dates. This is in contrast to the provision the Legislature made for scoring prior record variables. See MCL 777.50 (the 10-year rule for scoring prior record variables).[12] To use discharge dates to calculate the 5-year period in OV 13 would violate the Legislature's intent.

McDaniel wrongly decided the issue of OV 13. OV 13 was incorrectly scored in the instant case.

B. MR. FRANCISCO IS ENTITLED TO RESENTENCING.

Mr. Francisco's sentence is grounded in a mistake of law, i.e. an improperly inflated guidelines range, and thus his sentence is invalid. Correction of the error lowers the appropriate guidelines range. The guidelines range used at his sentencing was 87 months to 217 months (F-IV), while the correct guidelines range is only 78 months to 195 months (F-II).[13] Mr. Francisco is entitled to resentencing where the sentencing court did not indicate at the sentencing hearing that a lower range would have had no effect on the sentence it imposed.

MCL 769.34(10) provides:

> If a minimum sentence is within the appropriate guidelines sentence range, the court of appeals shall affirm that sentence and shall not remand for resentencing **absent an error in scoring the sentencing guidelines or inaccurate information relied upon in determining the defendant's sentence.** A party shall not raise on appeal an issue challenging the scoring of the sentencing guidelines or challenging

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[12] MCL 777.50 provides: "In scoring prior record variables 1 to 5, do not use any conviction or juvenile adjudication that precedes a period of 10 or more years between the discharge date from a conviction or juvenile adjudication and the defendant's commission of the next offense resulting in a conviction or juvenile adjudication."

[13] See SIR attached as Appendix A; MCL 777.16f (1st degree home invasion is a Class B offense); MCL 777.63(minimum sentence ranges for Class B offenses); MCL 777.21(3)(b)(increase of upper limit based upon habitual offender – 3rd status); see also West's Michigan Sentencing Guidelines Manual, 2003 edition, "Class B Offenses Habitual" grid, p 104.

> the accuracy of information relied upon in determining a sentence that is within the appropriate guidelines range unless the party has raised the issue at sentencing, in a proper motion for resentencing, or in a proper motion to remand filed in the court of appeals. (Emphasis added.)

By the plain terms of this section, an appellate court may remand for resentencing where there was a preserved error to the scoring of the guidelines and/or inaccurate information relied upon at sentencing even where the sentence imposed is within the appropriate lower range. This Court has recognized as much. See People v Kimble, 470 Mich 305, 311, 316-317 (concurring opinion), 684 NW 2d 669 (2004); People v Babcock, 469 Mich 247, 261, 666 NW2d 231 (2003); People v Hegwood, 465 Mich 432, 439, 636 NW2d 127 (2001).

It is the responsibility of the sentencing court to impose a sentence within the bounds set by the Legislature. Hegwood, supra at 437. Unlike the old judicial guidelines system, the statutory sentencing guidelines ranges do require adherence. Hegwood, supra at 438-439. Without consideration of the correct guidelines range, the sentencing court does not have the opportunity to properly exercise its discretion within the applicable bounds and the defendant and his counsel do not have a fully meaningful opportunity to allocute.

There is no question that an improperly inflated guidelines range may affect the sentence actually imposed.[14] This is most intuitively apparent in a number of situations, e.g., 1) a prison cell range was used and the appropriate range is actually a "straddle cell" range, which would have given the judge the option of imposing an "intermediate sanction" without departing

[14] The appropriate sentencing guidelines range serves as an invaluable tool and benchmark in a trial court's sentencing decision, even when a court elects to go above the guidelines range. This was recognized even under the judicial sentencing guidelines scheme. See People v Milbourn, 435 Mich 630, 654-655, 659, 461 NW2d 1 (1990); People v McCracken, 172 Mich App 94, 106, 431 NW2d 840 (1988).

downward, i.e., without having to find and articulate a substantial and compelling reason;[15] 2) the sentence imposed was at or near the bottom of the inappropriate range used, but the appropriate range would have allowed the judge to impose an even lower minimum term; and 3) the sentence imposed was at or near the middle of the inappropriate range used, but is at or near the high end of the appropriate range. But, it is also true in Mr. Francisco's situation, where the appropriate range is not a great deal lower than the range that was used.

This Court has repeatedly acknowledged that a sentence imposed under a mistake of law or based upon inaccurate information is an invalid sentence that entitles a defendant to resentencing.[16] People v Moore, 468 Mich 573, 579, 664 NW2d 700 (2003); People v Miles, 454 Mich 90, 96, 559 NW2d 299 (1997); People v Whalen, 412 Mich 166, 170, 312 NW2d 638 (1981). It is beyond question that the statutory sentencing guidelines range was intended to and does affect the sentence imposed.

Only the sentencing judge knows whether and how the appropriate lower range would have impacted the sentence that he or she imposed on a defendant. "It is clear that the Legislature has imposed on the trial court the responsibility of making difficult decisions concerning criminal sentencing, . ." Babcock, supra at 268. And, it is the trial court that should

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[15] In the parlance of the statutory sentencing guidelines, a "straddle cell" refers to the situation arising from MCL 769.34(4)(c) [previously MCL 769.34(4)(d)], in which the sentencing court has the discretion to impose either a prison sentence with a minimum within that range or an "intermediate sanction", and neither choice constitutes a departure. People v Stauffer, 465 Mich 633, 636 n 8 (2002). An intermediate sanction does not include a prison sentence. Stauffer, supra at 635.

[Taking that one step further, if a scoring error resulted in a prison cell range or a straddle cell range, and a prison sentence was imposed, when the appropriate range was actually an intermediate sanction cell, then the prison sentence would be an unarticulated upward departure from the appropriate range. MCL 769.34(4)(a) and (b) explain when the sentencing court is required to impose an intermediate sanction absent an upward departure.]

[16] A trial court by definition abuses its discretion when it makes an error of law. People v Lukity, 460 Mich 484, 488, 596 NW2d 607 (1999); Koon v United States, 518 US 81, 100, 116 S Ct 2035, 135 L Ed 2d 392 (1996).

make them in the first instance, not an appellate court. The trial court is better situated to make this determination, rather than an appellate court, because the trial court is more familiar with the facts of the case and the circumstances of the offender and because of its experience in sentencing. *Cf.* Babcock, supra at 268, 270 (in regard to whether a departure is warranted in a particular case.) As this Court has explained:

> The structure and content of the sentencing guidelines, as well as the organization of the appellate system itself, plainly reveal the Legislature's recognition that the trial court is optimally situated to understand a criminal case and to craft an appropriate sentence for one convicted in such a case. Babcock, supra at 267.

It is the job of the sentencing court to assess the appropriate guidelines range and other relevant information and to impose a sentence based upon those considerations; an appellate court cannot assume that the lower range would have had no effect based on its own assessment of the lower range. *Cf.* Babcock, supra at 258-259 ("the Court of Appeals cannot affirm a sentence on the basis that, even though the trial court did not articulate a substantial and compelling reason for departure, one exists in the judgment of the panel on appeal."); see also Williams v United States, 503 US 193, 204-205, 112 S Ct 1112, 117 L Ed 2d 341 (1992)(in reference to the federal sentencing guidelines). Appellate judges should not substitute their own judgment for that of the trial court in the area of sentencing. Babcock, supra at 268; Williams, supra at 205.

Similarly, federal courts have held that resentencing is required where the sentence imposed is within both the incorrect guidelines range used and the correct guidelines range, for both preserved scoring error and unpreserved scoring error, under a plain error analysis similar to Michigan's Carines standard.[17] See, e.g., United States v Gill, 348 F 3d 147, 155-156 (CA 6,

[17] People v Carines, 460 Mich 750, 763-765, 774, 597 NW2d 130 (1999).

2003)(preserved error); United States v Wallace, 32 F 3d 1171, 1174 (CA 7, 1994)(unpreserved error); United States v Knight, 266 F 3d 203, 207-209 (CA 3, 2001)(unpreserved error); United States v Warren, 361 F 3d 1055, 1058-1059 (CA 8, 2004)(unpreserved error).

In People v Mitchell, 454 Mich 145, 174 n 34, 560 NW2d 600 (1997), the Supreme Court cautioned against the adoption of statutory sentencing guidelines due to the administrative burden of appeals to the appellate courts. The Legislature later implemented the statutory sentencing guidelines, making policy decisions to allow appellate challenges to the scoring of the guidelines and to provide for appellate relief.[18] Decisions such as Mitchell and People v Raby, 465 Mich 432, 636 NW2d 127 (1998) must give way to MCL 769.34(10). See Hegwood, supra at 439. In fact, in adopting the statutory sentencing guidelines, the Legislature expanded the number of ways in which a defendant could preserve scoring challenges. Compare the version of MCR 6.429(C) in effect at the time the statutory sentencing guidelines were enacted with MCL 769.34(10). See Kimble, supra at 314 n 7.

There can be only two exceptions to remanding for resentencing where there was a mistake of law in calculating the sentencing guidelines: 1) where the error to the scoring of the guidelines does not change the recommended range and no reason exists to believe that the error affected the sentence imposed, People v Davis, 468 Mich 77, 83, 658 NW2d 800 (2003); or 2) where the sentencing court stated on the record that it considered the lower range that would have resulted if it had sustained the challenge to the scoring and that the lower range would not affect the sentence that it imposed, People v Mutchie, 468 Mich 50, 51, 658 NW2d 154 (2003); *Cf.* Babcock, supra at 271. Neither exception is met here.

[18] Appellant believes that the financial cost to the Department of Corrections in transporting defendants back for resentencing and the necessary expenditure of judicial resources will be more than made up for in savings to the State's budget from the reductions in minimum sentences that will result in many cases.

This Court should remand for resentencing.

SUMMARY AND REQUEST FOR RELIEF

WHEREFORE, for the foregoing reasons, Defendant-Appellant **CHARLES WAYNE FRANCISCO** asks this Honorable Court to grant leave to appeal or take appropriate peremptory action, to reverse, and to remand for resentencing.

Respectfully submitted,

STATE APPELLATE DEFENDER OFFICE

BY: _____

JACQUELINE J. McCANN (P58774)
Assistant Defender

ANNE YANTUS (P39445)
Managing Attorney,
Special Unit, Pleas/Early Releases

Dated: January 3, 2006

APPENDIX A

SENTENCING INFORMATION REPORT

03-189882-FH

Offender: Francisco, Charles Wayne SSN: 385-76-2585 Workload: 2864 Docket

Judge: The Honorable Rudy J. Nichols Bar No.: P24106 Circuit No.: 06

JUDGE RUDY J. NICHOLS
PEOPLE V FRANCISCO,C

Conviction Information

Conviction PACC: 750.110A2 Offense Title: Home Invasion - 1st Degree

Crime Group: Person Offense Date: 04/04/2003

Crime Class: Class B Conviction Count: 1 of 1 Scored as of: 04/04/2003

Statutory Max: 480 Habitual: 3rd Attempted: No

Prior Record Variable Score

PRV1: 75 PRV2: 5 PRV3: 0 PRV4: 0 PRV5: 2 PRV6: 0 PRV7: 0

Total PRV: 82

PRV Level: F

Offense Variable

OV1: 0 OV2: 0 OV3: 0 OV4: 0 OV5: 0 OV6: 0 OV7: 0

OV8: 0 OV9: 10 OV10: 0 OV11: 0 OV12: 0 OV13: 25 OV14: 0

OV16: 0 OV17: 0 OV18: 0 OV19: 0 OV20: 0

Total OV: 35

OV Level: IV

Sentencing Guideline Range

Guideline Minimum Range : 87 to 217

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OAKLAND COUNTY CLERK
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BY DEPUTY COUNTY CLERK

Minimum Sentence

	Months	Life
Probation:	0	☐
Jail:	0	
Prison:	102	☐

Sentence Date: OCT 17 2003

Guideline Departure: Consecutive Sentence:

Concurrent Sentence: Yes

Sentencing Judge: Date: OCT 17 2003

Prepared By: BRANTLEY, JEWELL D

APPENDIX B

STATE OF MICHIGAN 6TH JUDICIAL CIRCUIT OAKLAND COUNTY	JUDGMENT OF SENTENCE COMMITMENT TO CORRECTIONS DEPARTMENT	CASE NO. 2003-189882-FH

ORI: MI-630015J COURT ADDRESS: 1200 N. TELEGRAPH RD. PONTIAC, MI 48341

THE PEOPLE OF THE STATE OF MICHIGAN	V	FRANCISCO,CHARLES,WAYNE, [redacted]2 HARRISON PONTIAC MI 48341 CTN SID DOB 63-03-079201-02 1328996T 01/09/65	PHONE (248) [redacted]-9835

D02
C183314

PROSECUTING ATTORNEY NAME / BAR NO	DEFENDANT ATTORNEY NAME / BAR NO
DAVID G. GORCYCA P41352	MICHAEL L.,STEINBERG, P43481

THE COURT FINDS:

THE DEFENDANT PLEAD / FOUND GUILTY ON 09/23/2003 OF THE CRIME(S) STATED BELOW:

CNT	CONVICTED BY PLEA	CONVICTED BY COURT	CONVICTED BY JURY	CRIME	CHARGE CODE(S) MCL CITATION/PACC CODE
001			G	HOME INVASION - 1ST DEGREE	750.110A2
002				LIB	750.360 RESC
****	SENTENCE ENHANCED PURSUANT TO MCL 769.11.				

IT IS ORDERED:

DEFENDANT IS SENTENCED TO THE CUSTODY OF THE MICHIGAN DEPARTMENT OF CORRECTIONS. THIS SENTENCE SHALL BE EXECUTED IMMEDIATELY.

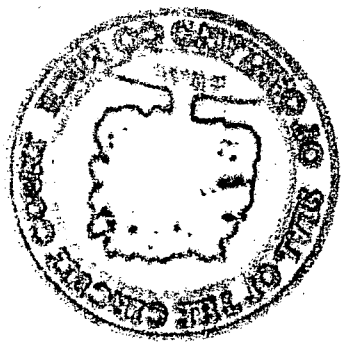
CNT	SENTENCE DATE	MINIMUM YRS	MINIMUM MOS	MINIMUM DAYS	MAXIMUM YRS	MAXIMUM MOS	SENTENCE BEGINS	JAIL CR MOS	JAIL CR DAYS	OTHER INFO
001	10/17/2003	8	6		40		10/17/2003		196	

DEFENDANT SHALL PAY RESTITUTION OF: $42.00. IF CASH BOND/BAIL WAS PERSONALLY POSTED BY THE DEFENDANT, PAYMENT TOWARD RESTITUTION IS TO FIRST BE COLLECTED OUT OF THAT BOND/BAIL AND ALLOCATED AS SPECIFIED UNDER MCL 775.22.

DEFENDANT SHALL PAY A $60.00 ASSESSMENT FOR THE CRIME VICTIM RIGHTS FUND.
DEFENDANT SHALL PAY A $60.00 FOR STATE MINIMUM COSTS.

FINES, COSTS, AND FEES NOT PAID WITHIN 56 DAYS OF THE DATE OWED ARE SUBJECT TO A 20% LATE PENALTY ON THE AMOUNT OWED.

OTHER: RESTITUTION OF $42 TO BE PAID JOINTLY AND SEVERALLY.



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..(CONTINUED ON PAGE 002)

STATE OF MICHIGAN 6TH JUDICIAL CIRCUIT OAKLAND COUNTY	JUDGMENT OF SENTENCE COMMITMENT TO CORRECTIONS DEPARTMENT	CASE NO. 2003-189882-FH

ORI: MI-630015J COURT ADDRESS: 1200 N. TELEGRAPH RD. PONTIAC, MI 48341

				PHONE
THE PEOPLE OF THE STATE OF MICHIGAN	V	FRANCISCO,CHARLES,WAYNE, 312 HARRISON PONTIAC MI 48341		(248) 758-9835
		CTN	SID	DOB
		63-03-079201-02	1328996T	01/09/65

PROSECUTING ATTORNEY NAME /	BAR NO	DEFENDANT ATTORNEY NAME /	BAR NO
DAVID G. GORCYCA	P41352	MICHAEL L.,STEINBERG,	P43481

(CONTINUED FROM PAGE 001)

RUDY J. NICHOLS
CIRCUIT JUDGE

DATE: 10/17/2003

JUDGE RUDY J. NICHOLS P24106

UNDER MCL 769.16A THE COURT CLERK SHALL SEND A COPY OF THIS ORDER TO THE MICH STATE POLICE CENTRAL RECORDS DIV TO CREATE A CRIMINAL HISTORY RECORD.

I CERTIFY THAT THIS IS A CORRECT AND COMPLETE ABSTRACT FROM THE ORIGINAL COURT RECORDS. THE SHERIFF SHALL, WITHOUT NEEDLESS DELAY, DELIVER DEFENDANT TO THE MICH DEPT OF CORRECTIONS AT A PLACE DESIGNATED BY THE DEPARTMENT.

(SEAL)

DEPUTY COURT CLERK

APPENDIX C

STATE OF MICHIGAN

COURT OF APPEALS

PEOPLE OF THE STATE OF MICHIGAN,

Plaintiff-Appellee,

v

CHARLES WAYNE FRANCISCO,

Defendant-Appellant.

UNPUBLISHED
May 26, 2005

No. 252188
Oakland Circuit Court
LC No. 03-189882 FH

Before: Saad, P.J., and Zahra and Schuette, JJ.

PER CURIAM.

The jury convicted defendant of first-degree home invasion, MCL 750.110a(2). He and a codefendant had separate juries. The court sentenced defendant to 8.5 to 40 years as a habitual offender who committed a third offense. MCL 769.11. He appeals as of right and we affirm.

I. FACTS

Defendant was tried along with co-defendant Chris Bernier, Jr. before separate juries. On April 4, 2003, defendant and Bernier entered the trailer of Joanne Oritz wearing masks and dark clothing. One of the men had a gun and threatened to kill Oritz and her two acquaintances if they did not sit down. Defendant and Bernier then took two purses from the women and left. Police later found a card bearing Oritz's name in defendant's back pocket.

II. JUROR VOIR DIRE

Defendant claims that the trial court erred in its allegedly inadequate voir dire of a juror who once worked for the court as a probation officer. We disagree.

A. Standard of Review

Whether the trial court conducted a sufficiently probing voir dire to uncover potential juror bias is reviewed for an abuse of discretion. *People v Tyburski*, 445 Mich 606, 609; 518 NW2d 441 (1994) "[W]here the trial court, rather than the attorneys, conducts voir dire, the court abuses its discretion if it does not adequately question jurors regarding potential bias so that challenges for cause, or even peremptory challenges, can be intelligently exercised." *Id.* at 619.

A trial court has considerable discretion in both the scope and conduct of voir dire. MCR 6.412(C). A defendant has no right to specific measures affecting the scope and conduct of voir dire, such as allowing counsel to ask the questions or sequestering individual jurors. *Id.* But a court does abuse its discretion if it conducts voir dire in a manner that does not adequately question jurors about potential bias such that a defendant may not intelligently exercise challenges for cause and peremptory challenges. *Id.* Such was not the case here.

B. Analysis

Defendant's argument that the voir dire was inadequate is unpersuasive because his reliance on *Tyburski* is misplaced. Several important facts distinguish that case. *Tyburski* was a high-profile murder trial subject to extensive media coverage, which gave the court "a duty to exercise caution in the manner it conducted voir dire." *Id.* at 624. All but two of the thirty-seven potential jurors called for questioning admitted exposure to the media coverage, as did eleven of the twelve who decided the case. *Id.* at 612 n 1. The court denied the defendant's motion for individual sequestered voir dire and a probing questionnaire for all prospective jurors, stating that it conducts its own voir dire for all its trials. *Id.* at 611. The court did not allow the attorneys to ask follow-up questions other than specific written ones that the court would submit. *Id.* It deemed some of the written questions irrelevant and did not ask them. *Id.* at 616-617. The Court characterized as "subtle admonishment" some of the trial court's reaction to jurors who admitted bias. *Id.* at 612.

In contrast, no publicity surrounded defendant's trial. Defendant was allowed to pose questions to potential jurors. The court did not deem any of defendant's questions irrelevant and did not refuse to submit any of them. While it did cut off questioning for cause, it did so after defendant conceded that his argument for cause due to bias lacked merit. Finally, the court did not subtly admonish prospective jurors for anything. The juror twice stated that she could put her work experience as a probation officer behind her and be fair and impartial. Defendant was allowed to query her about some details of her employment history. Finally, defendant challenges the voir dire of one juror, not the whole pool as in *Tyburski*. Defendant here cannot fairly show that the court did not allow him to intelligently use his challenges.

The court also did not err when it denied defendant's request for additional peremptory challenges. This Court reviews a denial of a request for additional peremptory challenges for an abuse of discretion. *People v Howard*, 226 Mich App 528, 536; 575 NW2d 16 (1997). MCR 6.412(E)(2) gives the court discretion to grant additional peremptory challenges on a showing of "good cause." According to the staff comment, the rule is based on 3 ABA Standards for Criminal Justice (2d ed), Standard 15-2.6(a), which allows allocating additional challenges "when special circumstances justify doing so."

The record does not support a finding of either good cause or special circumstances. Again, no special publicity surrounded this case. See *People v King*, 215 Mich App 310; 544 NW2d 765 (1996) (upholding denial of more peremptory challenges in case where publicity was not unfairly biased and where biased jurors were dismissed for cause). No particular reason other than the fact that the juror was once a probation officer alarmed defendant. Nothing she said indicated any bias and she disavowed bias twice. Defendant had no right to another peremptory challenge and the court did not abuse its discretion in refusing to give him one.

III. CODEFENDANT TESTIMONY

Defendant also argues that the court erred when it did not exclude from his jury the testimony of his codefendant's witnesses, specifically codefendant's sister and father.

A. Standard of Review

Defendant had a separate jury and the issues presented to this Court involve both severance and a challenge to the admission of evidence. Inherent to the issue of severance is what evidence to allow before a defendant's jury. Either way, the standard of review for both severance and admission of evidence is abuse of discretion. *Koester v Novi*, 213 Mich App 653, 663; 540 NW2d 765 (1995) (admission of evidence); *People v Hana*, 447 Mich 325, 346; 524 NW2d 682 (1994) (severance).

B. Analysis

Hana sets out the necessary framework for considering defendant's claim of error. Though defendant was granted a separate jury, he objects to it hearing the testimony of co-defendant's witnesses. According to *Hana*:

> [I]t is well settled that defendants are not entitled to severance merely because they may have a better chance of acquittal in separate trials . . . . While [a]n important element of a fair trial is that a jury consider only relevant and competent evidence bearing on the issue of guilt or innocence, . . . a fair trial does not include the right to exclude relevant and competent evidence. A defendant normally would not be entitled to exclude the testimony of a former codefendant if the district court did sever their trials, and we see no reason why relevant and competent testimony would be prejudicial merely because the witness is also a codefendant. [*Hana, supra* at 350 (quotation, citation omitted).]

The court noted that "spillover prejudice" inherent in every multiple defendant trial is not sufficient to warrant severance. *Id.* at 349. Instead, antagonistic defenses must be mutually exclusive such that "if the jury, in order to believe the core of the evidence offered on behalf of one defendant, must disbelieve the core of the evidence offered on behalf of the co-defendant." *Id.* at 350. Such a scenario does not exist in this case. Furthermore, the Court in *Hana* concluded that the defendant failed to show the violation of any rights where his jury was not "exposed to evidence that would have been barred from their consideration in separate trials." *Id.* at 360. Here, defendant does not contend that the testimony of his codefendant and his codefendant's sister and father was inadmissible.

The prejudice defendant claims is of the spillover variety. For example, he argues that his codefendant implied that defendant was guilty and that the fact of his testimony was prejudicial because defendant did not testify and juries want to hear from defendants. Most defendants in a multiple defendant trial could claim this kind of prejudice. The law requires more, which defendant cannot show. Defendant and codefendant both rested their defenses on theories of identification. Both defendants denied culpability but neither defendant accused the other and therefore, their defenses were not mutually exclusive. Furthermore, the court repeatedly and at different stages of trial instructed both juries only to consider only the evidence

as it related to their defendant. Absent a contrary showing, jurors are presumed to follow the court's instructions. See, e.g., *People v Mette*, 243 Mich App 318, 330-331; 621 NW2d 713 (2000). The court did not err in denying defendant's request to exclude from his jury codefendant's witnesses.

IV. SENTENCING

Finally, defendant challenges his sentence. Specifically, he disagrees with how two offense variables were scored.

A. Standard of Review

Interpretation of how the sentencing statutes apply to defendant is a question of law that this Court reviews de novo. *People v Kimble,* 470 Mich 305, 308-309; 684 NW2d 669 (2004).

B. Analysis

Defendant maintains that insufficient evidence supported a finding of multiple victims. MCL 777.39(1) requires a score of ten for OV 9 if there were 2 to 9 victims. A victim is a person placed in danger of injury or loss of life. MCL 777.39(2)(a). Sufficient evidence supported the court's finding that there were at least two victims. Joanne Ortiz testified that the two men acted in concert when they entered the trailer and one pointed a handgun at her. He threatened to kill her if she didn't sit down. Sheila Mendoza and Rhonda Farmer were also present. The men took Ortiz and Farmer's purses. Mendoza also testified that one of the men threatened to hurt or kill the women present. She believed that one of the men carried a gun based on his body language though she did not actually see a gun. One of them threw a piece of crystal in the direction of Farmer and her, though no one was hit. The jury found beyond a reasonable doubt that defendant was one of the men.

The testimonial evidence provided sufficient basis for a score of ten points for OV 9. Three persons were verbally threatened with death or physical injury. The men were armed with a handgun. The crystal was another weapon that placed at least two of those present in danger of injury. Finally, the confined space of the scene of the crime, a trailer with only one exit with steps, and the nature of the crime of home invasion inherently put everyone inside the trailer at risk of death or injury, whether it came from a fired bullet or a flung piece of crystal.

Defendant's argument for OV 13 is also unavailing. OV 13 scores points for a continuing pattern of criminal behavior. MCL 777.43. Defendant received under MCL 777.43(1)(b) a score of twenty-five points for a pattern of crime involving three or more crimes against a person. He was convicted of three counts of manslaughter in 1986. The issue on appeal is whether those three convictions should count as part of a continuing pattern. Time is the relevant consideration. According to MCL 777.43(2)(a):

> For determining the appropriate points under this variable, all crimes within a 5-year period, including the sentencing offense, shall be counted regardless of whether the offense resulted in a conviction.

Defendant says that the statute requires that his past felony convictions must have occurred within five years of his present home invasion offense. The prosecution's position is that the statute authorizes the scoring of points for crimes committed during any five-year period.

Case law settles this question in favor of the prosecution. According to this Court:

> The statute clearly refers to "a 5-year period." The use of the indefinite article "a" reflects that no particular period is referred to in the statute. Had the Legislature intended the meaning defendant assumes, the statute would refer to "the 5-year period immediately preceding the sentencing offense." Instead, the phrase "including the sentencing offense" modifies "all crimes." That is, the sentencing offense *may* be counted as one of the three crimes in *a* five-year period. That does not, however, preclude consideration of a five-year period that does not include the sentencing offense. [*People v McDaniel*, 256 Mich App 165, 172-173; 662 NW2d 101 (2002) (emphasis in original).]

Like defendant in this case, the defendant in *McDaniel* had three convictions from the 1980s that factored into his sentencing though his current offense happened many years later. *Id.* at 173. Though *McDaniel* involved past crimes that happened separately and were crimes against property and not persons as in this case, these factual distinctions do not require or even allow a different legal outcome. Simple application of *McDaniel* required the trial court to score twenty-five for OV 13.

Affirmed.

/s/ Henry William Saad
/s/ Brian K. Zahra
/s/ Bill Schuette

APPENDIX D

21926

Order

Michigan Supreme Court
Lansing, Michigan

December 7, 2005

Clifford W. Taylor,
Chief Justice

129035

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APPELLATE DEFENDER OFFICE

Michael F. Cavanagh
Elizabeth A. Weaver
Marilyn Kelly
Maura D. Corrigan
Robert P. Young, Jr.
Stephen J. Markman,
Justices

PEOPLE OF THE STATE OF MICHIGAN,
Plaintiff-Appellee,

v

SC: 129035
COA: 252188
Oakland CC: 03-189882-FH

CHARLES WAYNE FRANCISCO,
Defendant-Appellant.

_____/

On order of the Court, the application for leave to appeal the May 26, 2005 judgment of the Court of Appeals is considered, and we direct the Clerk to schedule oral argument on whether to grant the application or take other peremptory action. MCR 7.302(G)(1). The parties are directed to file supplemental briefs by January 5, 2006, addressing: (1) whether *People v McDaniel*, 256 Mich App 165, 172-173 (2003), was correct in deciding that OV 13 may be scored based on three or more felonies committed in any five-year period even if that period does not include the date of the sentencing offense, and (2) assuming OV 13 should not have been scored, is defendant automatically entitled to resentencing because of the scoring error, or is resentencing unnecessary because the minimum sentence imposed was "within the appropriate guidelines sentence range" within the meaning of MCL 769.34(10).

We further order the Oakland Circuit Court to appoint the State Appellate Defender Office to represent the defendant in this Court.

I, Corbin R. Davis, Clerk of the Michigan Supreme Court, certify that the foregoing is a true and complete copy of the order entered at the direction of the Court.

December 7, 2005

Corbin R. Davis
Clerk

t1206